92-1659

No.

Supreme Court, U.S.
FILED
APR 14 1993
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

XYZ CORPORATION, *et al.*
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the effort of company employees in compiling information and preparing analyses at the request of counsel to assist the company in defense of a criminal investigation is protected by the work product doctrine?

PARTIES TO THE PROCEEDING BELOW

This petition is filed on behalf of all appellants in the court below. This case arose out of a civil contempt proceeding in connection with a grand jury investigation. The United States was the sole appellee. With the exception of the United States, all parties have been referred to by pseudonyms to protect the secrecy of the grand jury. XYZ Corporation is a target of the grand jury investigation.* XYZ Corporation's work product immunity is at issue on this petition. There are five additional petitioners, the remaining appellants below. John Doe #1, #3, #5, and #6 are four employees of XYZ Corporation who asserted privilege on the Company's behalf in the grand jury. Richard Roe is the President of XYZ Corporation and has also been identified as a target of the grand jury investigation.

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* A letter identifying the true name of XYZ Corporation has been lodged with the Clerk under seal. Pursuant to Rule 29.1, petitioners state that XYZ Corporation has no parent corporation and no subsidiary corporations (except wholly owned subsidiaries).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit dated November 19, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit dated November 19, 1992 is reported at 979 F.2d 939 and is set forth in the Appendix at 1a-15a. The district court order which gave rise to the appeal is not reported and is set forth in the Appendix at 16a-33a. The district court opinion as set forth in the Appendix substitutes appropriate pseudonyms for the names of the parties involved.

JURISDICTION

The opinion of the Court of Appeals was issued and judgment entered on November 19, 1992. A timely petition for rehearing was denied on January 15, 1993. App. at 34a-35a. This petition is filed within ninety days of the denial of the petition for rehearing. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition presents the question whether the effort of company employees who gather information at the direction of counsel in order to defend the company in a grand jury investigation is protected by work product immunity. The court below held that the work product doctrine does not bar opposing counsel from inquiring into the fact-finding and analysis performed by such employees, or into the conclusions they reached as a result of their efforts. As shown below, that holding is in direct conflict with the decisions of this Court and other circuits considering these issues. Because the decision below addresses an issue confronted daily by litigants preparing complex cases for trial, it will have an immediate and pervasive impact in many cases now pending in the federal courts. If uncorrected, it will affect the conduct of litigants in virtually every future case involving complex facts.

Summary

The government initiated this action on March 10, 1992 by obtaining an order to show cause why six grand jury witnesses, employees of XYZ Corporation (the "Company"), who had asserted the Company's attorney-client and work product privileges in response to questions posed to them in the grand jury, should not be held in contempt.[1] The district court had subject matter jur-

[1] Contempt proceedings against two of the six employee-witnesses were dismissed because it turned out that they had never been asked the questions that were the subject of the order to show cause.

isdiction over the civil contempt proceeding pursuant to 28 U.S.C. §§ 1826, 1331 and 1345. The Company itself, and Richard Roe, Chairman and President of the Company—targets of the investigation—intervened to protect the Company's privilege claims. They moved (along with the witnesses) to quash the grand jury subpoenas with respect to questions about studies these employees had done at the specific request of counsel to assist the Company in formulating its defense.

On June 8, 1992, the United States District Court for the Eastern District of New York for the most part denied the motion to quash and directed the witnesses to respond to the questions posed by the prosecutor about the studies they conducted. On November 19, 1992, a panel of the Court of Appeals for the Second Circuit affirmed, with modification, the "district court's order compelling [the employee-witnesses] to answer certain listed questions . . . ." App. at 12a.[2] On January 15, 1993, the Court of Appeals denied Appellants' Joint Petition for Rehearing.

The Grand Jury Investigation

As noted by the court below, "the facts in this case are straightforward and undisputed." App. at 3a.

The Company is in the business, *inter alia*, of designing and building sophisticated timing mechanisms used in satellites and in other applications. *Id.* A grand jury in the Eastern District of New York has been investigating the Company and its senior management with respect to certain subcontracts between the Company and another firm in connection with a project for a federal government agency (the "Fox contracts"). App. at 3a-4a. It is apparently the prosecutor's position that the Company overstated its costs when submitting vouchers for work performed on those subcontracts. App. at 4a.

[2] The questions at issue are appended to the opinion of the court below. They are set forth at App. 13a-15a.

The Company learned of the investigation when search warrants were executed and grand jury subpoenas were served for Company records, and promptly retained outside counsel to begin considering its defense. In January 1991, counsel asked employees familiar with certain technical aspects of the Fox program to address issues relevant to the Company's potential defenses.[3] The employees did so, reporting to counsel on the results of their efforts.

One year later, on January 27, 1992, the government conducted pre-grand jury interviews of Company employees who had been involved in those earlier efforts for counsel. In those interviews, the government inquired about any analyses these employees had performed. Upon learning that the prosecutor was making such inquiries, counsel for the Company wrote to the prosecutor and to the employee-witnesses' personal counsel, asserting the Company's attorney-client and work product privileges. The Company asked the government to refrain from asking questions about work performed for Company counsel. App. at 5a.

The next day, the government asked several witnesses the contested questions in the grand jury. Each witness

[3] The affidavits submitted to the district court establish that each employee knew that counsel had commissioned the analysis, that the employees had respected their obligation to maintain confidentiality, and that the employees reported their results to counsel. *See* App. at 27a.

One theory of defense required that estimates be made by persons familiar with hardware for the subcontracts: a frequency source amplifier, a voltage controlled crystal oscillator, a frequency multiplier power amplifier, a calibration upconverter, a reference generator unit, and a surface acoustic wave oscillator. App. at 4a-5a. An *in camera* affidavit of counsel, submitted to the court below, explains this initial theory of defense and how the efforts of the employee-witnesses fits in with that theory. *See* App. at 26a. It is sufficient for purposes of this petition to note the uncontested fact that the work that was performed by these employees was performed for counsel in order to assist in the Company's defense.

declined to answer, asserting privileges on the Company's behalf.[4] *Id.* The government then obtained an order to show cause why the employees should not be held in contempt.

Proceedings In The District Court

The government provided the court and the parties with paraphrased versions of the questions at issue. It identified various questions which it had actually asked the witnesses (Category "I," App. at 13a), and provided an additional set of questions that it proposed to ask in the future (Category "II," App. at 13a-14a). The questions (and responses by the witnesses to the Category "I" questions) demonstrate that the government sought to inquire directly about the analyses these employees performed for Company counsel after the Company had learned of the investigation. The Category "II" questions inquire even more deeply and directly into the employees' undertaking and the conclusions they drew from their efforts.[5] *See* App. at 13a-14a.

The Company had suggested that because the government had available to it all of the relevant records, the government could simply ask the witnesses to conduct analyses of the government's choosing, instead of asking them about the analyses they had done for Company counsel. *See* App. at 5a. The government declined to adopt the Company's suggestion. *Id.* It did, however,

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[4] Several of the witnesses read a statement in response to the prosecutor's questions setting forth their understanding that the Company was asserting the confidentiality of the attorney-client privilege and work product doctrine for "all information and materials generated" at the direction of counsel. App. at 5a.

[5] The written reports containing the employees' estimates and conclusions were submitted by the Company to the district court for *in camera* inspection, along with affidavits of counsel. The government has repeatedly conceded, and the district court and Court of Appeals accepted (App. at 7a, 26a), that these *written* reports are privileged and need not be disclosed.

formulate a third set of questions which it submitted to the district court. (Category "III," App. at 14a-15a). The Company conceded that these "Category III" questions, which do *not* inquire about the analyses performed for counsel, could properly be asked by the government (provided the witnesses were instructed to answer from their pre-existing knowledge of the underlying facts and without reference to their work for Company counsel).

The district court nonetheless rejected the Company's privilege claims. The court noted that the government did not dispute that copies of the written reports were protected by the attorney-client privilege. App. at 26a. The court held, however, that the government was free to inquire orally about the employees' efforts and the conclusions drawn from those efforts because those efforts and conclusions were "underlying facts and opinions." App. at 30a.

Proceedings In The Court Of Appeals

On appeal of the district court's order, the Company stressed that the "analyses performed . . . and the factual results requested by the government are not *pre-existing* facts known to the witnesses prior to their communications with counsel: they are new facts specially created at the request of counsel." Thus, the application "of the privileges to these analyses does not hide something that the witnesses knew before they communicated with counsel[. I]t protects a body of information that did not exist until after counsel requested it."

Nonetheless, the Second Circuit affirmed the district court's decision in substantial part. It held that by "[e]xamining the 23 questions we see no trampling of either privilege, except in four questions."[6] App. at 10a.

[6] *See* App. at 14a. The questions the panel deemed improper (Nos. 8, 9, 14, 15) were those which inquired into or referred to actual discussions with counsel. The court said that "[t]he form of these four questions, considered in sequence, risks violation of the attor-

Specifically, with respect to work product, it concluded that because the "attachments to the affidavits appear to be nothing but straightforward calculations from raw data," the work product protection does not apply. App. at 11a.

REASONS FOR GRANTING THE WRIT

This petition presents an important question about the right of a company and its counsel to enlist the assistance of the company's employees in preparing to defend a civil or criminal lawsuit. In holding that the efforts of such employees are not protected as work product, the decision below conflicts with this Court's precedents and the decisions of other federal courts of appeals on a fundamental question of federal law and federal practice. If uncorrected, the decision will have a pervasive impact on investigations and trial preparation in a wide variety of cases.

The decision below creates a rule that "no common law privilege" prevents a party from first establishing that his adversary's employees conducted purely factual analyses at the direction of counsel in anticipation of litigation, and then inquiring further:

> "[W]hat did you do [to analyze the facts in issue]?"
>
> "[W]hat analysis did you conduct?"
>
> "What reviews of [the disputed contracts] did you conduct?"
>
> "What conclusions did you draw?"

App. at 13a, 14a (Questions I.1; I.3; I.4; II.A.13).

Any attorney who has tried to make an initial assessment of a client's position in connection with a complex case, or who has tried to prepare such a case for trial,

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ney-client privilege because the witness, in responding, might be understood to be implying to the grand jury that he had conveyed privileged information to the lawyer." App. at 11a.

knows how important it is to be able to obtain the assistance of company employees in rooting out the facts, testing theories and arriving at conclusions about how best to proceed. The need to draw upon the resources of the client to gather, analyze, and decipher technical or financial data arises in virtually all such cases. Indeed, it is the right of a litigant—whether it be a company through its employees, or an individual through his or her own action—to assist in its own defense, without fear that its efforts will be automatically discoverable by its adversary.

In holding that "no common law privilege" bars opposing counsel from inquiring directly into the efforts of a litigant and its employees to prepare a defense (at least so long as those efforts do not appear to involve mental impressions), the court below has reached a result sharply at odds with the law set forth in this Court's decisions. The decision of the court below would provide a ready mechanism by which a litigant could bootstrap on the efforts of its more diligent opponent to investigate and gather the facts—a result heretofore regarded, under this Court's decisions, as inconsistent with the premises of the adversary system. Indeed, a party need only threaten suit and, if the target of the threat responds by calling in counsel and conducting a thorough investigation, that party may simply claim the fruits of the investigation (at least in unwritten form) for its own.

Because it addresses a core aspect of discovery and case preparation, the immediate effects of this decision will be far-reaching, limiting the ability of attorneys in both criminal and civil cases to enlist the aid of their clients' employees in preparing their cases. The risk of disclosure will cause many litigants to think twice before embarking upon any significant effort at case analysis and fact-finding, knowing that the product of that effort will be discoverable by the opposing side. The prejudice borne by the client in these circumstances will *not* be redressed,

for those who are dissuaded by this decision from proceeding with a thorough investigation will not have any right of appeal. On the other hand, attorneys who have relied on the decisions of this Court to enlist the aid of their clients' employees for assistance in gathering facts for trial will now find the product of their efforts disclosed to their opponent. But despite the importance of the question presented, it is not likely to reach the court again soon because questions of privilege are frequently interlocutory in nature, and are not readily appealed.

Thus, certiorari should be granted in this case to restore work product immunity to a litigant's own efforts in preparing a defense.

I. THE DECISION BELOW UNDERMINES THE WORK PRODUCT DOCTRINE BY ELIMINATING PROTECTION FOR "ORDINARY" OR "FACT" WORK PRODUCT PREPARED BY A PARTY, AT THE REQUEST OF COUNSEL, TO AID IN ITS OWN DEFENSE

Since this Court's decision in *Hickman v. Taylor*, 329 U.S. 495 (1947), the federal courts have recognized that a party's efforts in anticipation of, or preparation for, litigation, are presumptively shielded from discovery by the work product principle. The court below nonetheless observed that "[w]hether the work product of counsel gathered and devised in preparation for litigation, such as facts, legal contentions or trial tactics, may be discovered is a highly controversial area of the law, as this case illustrates. The boundaries of the [work product] doctrine are far from fixed."[7] App. at 9a.

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[7] The assessment of the court below mirrored a similar assessment nearly twenty years ago in *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 733 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975): "[T]he most controversial problem in the discovery area is the extent to which a party may require divulgence of facts, legal contentions, or trial tactics gathered or devised by his adversary in preparation for litigation." In the 20

Notwithstanding that observation, presumably addressed to the treatment of work product by the lower courts, this Court has repeatedly reaffirmed the existence of work product immunity as a "basic rule in the litigation context." *FTC v. Grolier, Inc.*, 462 U.S. 19, 24 (1983); *see Upjohn Co. v. United States*, 449 U.S. 383 (1981); *United States v. Nobles*, 422 U.S. 225 (1975); *Hickman*, 329 U.S. 495. The " 'strong public policy' underlying the work product doctrine," *Upjohn*, 449 U.S. at 398, has uniformly been taken as the guidepost in its application.

The work product privilege allows a litigant "a certain degree of privacy, free from unnecessary intrusion by opposing parties . . . [to] prepare his legal theories and plan his strategy without undue and needless interference." *Hickman*, 329 U.S. at 510-11. Although the work product "privilege" is frequently asserted in civil cases, it is even more "vital" in criminal cases because "the question of guilt or innocence demands that adequate safeguards assure the thorough preparation and presentation of each side of the case." *Nobles*, 422 U.S. at 238.

The rationale for the rule is simply that without it, a litigant will be constrained in mounting its defense by the fear that its own efforts will prove even more beneficial to its adversary than to itself:

> Were [work product] materials open to opposing counsel on mere demand . . . [i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the

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years since *Duplan*, apparently little has been done to eliminate the controversy in this fundamental area of practice. As evidenced by the decision of the court below, there continues to exist a tendency to treat the resolution of cases involving the work product doctrine as calling for the weighing of broad policies, instead of applying the precedents established by this Court.

> clients and the cause of justice would be poorly served.

Hickman, 329 U.S. at 511. As noted in *Upjohn*, "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary." 449 U.S. 383, 396 (1981), *quoting Hickman*, 329 U.S. at 516 (Jackson, J., concurring).

Although difficulties have occasionally arisen in the application of the doctrine, this Court's cases have provided a straightforward test for identifying work product in the first instance. The definition itself is seemingly capable of application in every case. Work product is that which is done in anticipation of litigation, in preparation of one's defense. That definition is explicit in Rule 26(b)(3) of the Federal Rules of Civil Procedure, which partially codifies *Hickman*'s holding, and thus allows discovery of work product only in limited circumstances:

> [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and *prepared in anticipation of litigation or for trial* by or for another party or by or for that party's representative (including the other party's attorney, consultant . . . or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney. . . . (emphasis added)

Fed. R. Civ. P. 26(b)(3). The definition of work product—"things otherwise discoverable . . . prepared in anticipation of litigation"—follows directly from the underlying purpose of the rule, which is to allow a case to be defended and prepared for trial as the litigant believes

necessary, without fear that the product of its efforts will accrue to the benefit of its opponent.

To be sure, work product protection is not absolute. It can be overcome upon a showing of substantial need by the party seeking discovery. *Upjohn*, 449 U.S. at 400-01; *Hickman*, 329 U.S. at 511-12; Fed. R. Civ. P. 26(b)(3). Specifically, ordinary work product—i.e. compiled data, or "fact work product," as distinguished from "mental impressions"[8]—may be obtained from one's adversary upon a showing of "substantial need and inability to obtain the equivalent without undue hardship." *Upjohn*, 449 U.S. at 400; Fed. R. Civ. P. 26(b)(3).[9] Even then, disclosure of mental impressions and opinions is to be avoided.[10] But as is implicit in *Upjohn*, the existence or nonexistence of mental impressions does not go to whether the materials are work product, as the court below apparently believed, but instead goes to the degree of protection afforded to the material.

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[8] 4 J. Moore et al., Moore's Federal Practice ¶ 26.64[2] (2d ed. 1993) ("Material which is appropriately classified as work product can be divided into two general categories: (1) 'factual' work product, and (2) 'opinion' work product, that is material containing an attorney's mental impressions, conclusions, opinions or legal theories").

[9] *See Hickman*, 329 U.S. at 511 ("Where relevant and nonprivileged facts remain hidden in an attorney's file and *where production of those facts is essential to the preparation of one's case*, discovery may properly be had").

[10] *See* Fed. R. Civ. P. 26(b)(3). Opinion work product consists of attorney memoranda, notes and other work product revealing an attorney's mental processes, while ordinary work product encompasses the "residue." *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1014 (1st Cir. 1988). Some courts provide absolute protection to opinion work product, *see Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975), while others provide "nearly absolute immunity," allowing discovery in "rare and extraordinary cases." *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977); *see Upjohn*, 449 U.S. at 401-02.

There was no attempt to show hardship or substantial need in this case.[11] Instead, the requirement for such a showing was pretermitted by the holding of the court below that inquiry into the efforts of these employees was permissible because those efforts, and the conclusions reached through those efforts, were somehow *not* work product at all, and that "there is no common law privilege" barring inquiry into the employees' methods and results. App. at 12a. The precise basis for the panel's conclusion that it could define such efforts as *non*-work product is difficult to discern.

A. The Second Circuit panel appears to have approached the issue as if it called for an *ad hoc* reconciliation of larger competing interests in determining what could be protected as work product.[12] Such an approach simply ignores this Court's cases, which have already drawn the proper balance. Under the cases of this Court, whether something is work product is determined as a matter of fact, based upon whether it was prepared in anticipation of litigation. The only occasion for balanc-

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[11] Rather than make a showing of need, the government contented itself with the bold and circular assertion that it needed to obtain information about these analyses from these witnesses because it could not obtain information about these analyses from other sources, and that it needed these analyses because it might "provide the government with evidence relevant to crimes currently under investigation." App. at 29a.

[12] In approaching both the work product and the attorney-client issues, the court below saw itself as reconciling two overriding policies:

> Squarely presented for reconciliation are the seemingly conflicting interests of disclosure and secrecy. Discovery, designed to advance the pursuit of truth, takes the 'sporting' element out of litigation by eliminating surprise. The inviolability of confidential communications between attorney and client and the protected privacy of the attorney's work product also contribute to the efficient functioning of the adversarial system's search for truth.

App. at 3a.

ing is in determining whether something that is work product must nonetheless be divulged on the basis of a showing of "substantial need" that is absent from the record in this case.

B. The courts below appear to have been skeptical about the application of work product protection to the efforts of litigants on their own behalf, in this case, the efforts of employees of the corporation being investigated. That skepticism has no basis. The language of Rule 26(b)(3) makes it clear that work product protection is *not* limited to the efforts of *an attorney*, but naturally covers a litigant's *own* efforts, in its own behalf, in anticipation of litigation or trial ("prepared in anticipation of litigation or for trial *by* . . . another *party* or by or for that other party's *representative* (including the other party's . . . *agent*) . . ."). *Compare* App. at 11a ("the affidavits . . . undercut . . . the privileged nature of much of the information as *attorney's* work product").

As the language of Rule 26(b)(3) reflects, the policy underlying the work product immunity could require no less protection for a party's own efforts than for those of its attorney. A party has no less right to prepare its own defense, enlist the assistance of its employees, and put its employees at the disposal of outside counsel, than it does to retain an outside lawyer to assist in its defense in the first instance. Where counsel specially retained for litigation actually directs the gathering of facts and preparation of materials, as here, it only confirms that the materials have truly been generated in anticipation of litigation.

C. In applying its approach, the panel ultimately held that no privilege prevented inquiry into these employee efforts because it perceived no "judgments," "estimates" or "mental impressions" in the results—only "straightforward calculations from raw data." App. at 11a. That approach is in error because it confuses the inquiry about

"whether something is work product at all" with the question "whether the work product warrants the special protections afforded mental impressions."[13] *Compare Upjohn*, 449 U.S. at 399-400. If something does not contain "mental impressions," that is not dispositive of whether it is work product. To the contrary, work product usually and ordinarily refers to the compilation and collection of *facts*. *See* Fed. R. Civ. P. 26(b)(3). Once it is recognized that the fact-gathering was done in anticipation of litigation—as all parties and the courts below acknowledged throughout—then that process, its product, and the conclusions drawn from it, are "work product" protected by *Hickman v. Taylor* and Rule 26. No work product of *any* variety may be discovered by an opponent, except upon a showing of hardship and substantial need. By its failure to respect this principle founded in the plain language of the Rule and in this Court's decision in *Upjohn*, 449 U.S. at 399-400, the Second Circuit's decision is in direct conflict with other circuits that recognize the protection owing to "fact" or "ordinary" work product, as well as to "opinion" work product.[14]

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[13] It is difficult to see how these employees' conclusions could *not* be regarded as "mental impressions." The very nature of the task that these employees were assigned conveys important information about defense counsel's theory of the case. *See Upjohn*, 449 U.S. at 399-400. *See generally Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985) (counsel's selection and compilation of documents reveals important aspects of counsel's understanding of the case and is therefore considered to be opinion work product).

[14] *See, e.g., In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1007, 1014 (1st Cir. 1988); *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985); *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 983 (4th Cir. 1992); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 732-33 (4th Cir. 1974); *In re Int'l Sys. & Controls Corp.*, 693 F.2d 1235, 1239-40 (5th Cir. 1982); *Toledo Edison Co. v. G A Technologies, Inc.*, 847 F.2d 335, 339-40 (6th Cir. 1988); *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977); *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*,

D. In holding that fact gathering and analysis by employees was *not* work product, the Second Circuit appeared to be moved by the following concern: "[M]erely by asking witnesses to conduct an analysis defense counsel may not thereby silence all the key witnesses on the cost aspects of the Fox contracts under either claim of privilege." App. at 10a. The district court's holding that the analyses of these employees and their conclusions from those analyses were "underlying facts" seems to reflect a similar concern.

But the proper application of the work product rule does not trigger such concerns. Work product does not shield the underlying facts from discovery. The work product doctrine, just as the attorney-client privilege, "puts the adversary in no worse position than if the communications had never taken place." *Upjohn*, 449 U.S. at 395; *see also Hickman*, 329 U.S. at 513. Thus, the government was free in this case to ask about what the witnesses knew before they began their investigations for counsel. The government was also free to ask the witnesses directly for their opinions, including their opinions about what documents might be relevant. *Compare* App. at 5a. But it is a different matter entirely to ask the witnesses to describe the analyses that were done *for* counsel, the documents reviewed in connection with that effort, the information obtained in the course of that effort, and the conclusions they reached from those efforts. That is precisely what the government sought here.[15] That in-

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860 F.2d 844, 846 (8th Cir. 1988); *In re Murphy*, 560 F.2d 326, 329 n.1, 334 (8th Cir. 1977); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir. 1989); *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir. 1982); Moore et al., *supra* note 8.

[15] In the context of this case, where it was established that the witnesses' only "analysis" was that performed for counsel, questions such as "[W]hat analysis did you perform?," "What records did you review?," and "What conclusions did you draw?" are not addressed to *pre-existing facts*, i.e. facts that the witnesses knew prior to the government's investigation. Such questions elicit that which

quiry was improper (absent a showing of a need) because it sought that which had been created only by virtue of the litigation itself.

In contrast with the decision below, other courts have had little difficulty drawing a clear line between pre-existing knowledge (which is underlying fact), and knowledge acquired in anticipation of litigation (which is work product). In *Marine Petroleum Co. v. Champlin Petroleum Co.*, 641 F.2d 984, 987, 988 (D.C. Cir. 1980), the court thus applied Fed. R. Civ. P. 26(b)(4)(B) to the work product of an expert who "wore two hats—that of a general consultant [with knowledge of the underlying facts] and that of an expert engaged in preparation for litigation." The distinction which the court drew there was precisely what the work product rule requires: Plaintiff "could have orthodox discovery of facts known or opinions held by [the consultant] prior to the time at which he began to devote his talents to the litigation . . . but not with respect to information developed thereafter." The information developed *for* the litigation was protected. Therefore, on this issue as well the decision of the court below is in conflict with the approach taken in other circuits.

In declining to apply the definition of work product employed by this Court and the Federal Rules, and in its refusal to afford work product protection to fact work product created by company employees (rather than attorneys) in defense of the company, the decision below creates a work product rule in the Second Circuit that is in fundamental conflict with the decisions of this Court, and other circuit courts, applying the clear language of this Court's cases.

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was generated for counsel after the Company learned it was the target of the grand jury investigation. *See Hickman*, 329 U.S. at 510.

II. THE DECISION BELOW CREATES A SERIES OF ANOMALIES AND UNDERMINES THE ATTORNEY-CLIENT PRIVILEGE

The decision creates a host of anomalies in the application of the work product and attorney-client privileges. For example, it was conceded by the government that copies of the written reports prepared by the employee-witnesses were protected—at least by the attorney-client privilege. On the other hand, the government argued, and the courts below held, that the government could effectively pierce that restriction by simply asking the witnesses to testify orally about what they had done. Thus, while the facts gathered, and conclusions drawn, were deemed protected in their written manifestations, the intangible work product (that is, tangible work product in oral or unwritten form [16]) could be freely inquired into. The anomalies are apparent.

The form of the inquiry and the form of the work product itself (whether it is in some tangible form, i.e. a document, or whether it simply resides in the memory of the witness) should be irrelevant in assessing work product protection.[17] *Hickman* itself involved a situation

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[16] *See Special Project, The Work Product Doctrine*, 68 Cornell L. Rev. 760, 839 (1983).

[17] In the lower courts, the government argued that the work product privilege "shields only prepared materials" such as "documents or other tangible things." App. at 28a.

Although Rule 26(b)(3) pertains to "documents and tangible things . . . prepared in anticipation of litigation," courts have held that work product principles should not be read to imply that "mental impressions *not* embodied in documents are otherwise discoverable." *Ford v. Phillips Elecs. Instruments, Co.*, 82 F.R.D. 359, 360 (E.D. Pa. 1979); *see also International Business Machs. Corp. v. Edelstein*, 526 F.2d 37, 41 (2d Cir. 1975); Moore et al., *supra* note 8, ¶ 26.64[1] (*Hickman* is broader than Rule 26). The same "'general policy against invading the privacy of an attorney's course of preparation' of a case" enunciated in *Hickman* applies regardless of whether the work product is elicited through oral testimony or otherwise. *Ford*, 82 F.R.D. at 360, *quoting Hickman*,

where an attorney had been asked to provide a written description of oral conversations with witnesses. Thus, he was asked to provide in writing what was, up until then, merely "intangible"—his knowledge of conversations with witnesses. Indeed, *Hickman* made clear that certain materials, such as oral conversations with witnesses, could not be inquired into "whether presently in the form of . . . mental impressions or memoranda." 329 U.S. at 512. Thus, *Hickman* indicated that the *form* of the material, whether tangible or intangible, was irrelevant to its eligibility for the protection of the work product rule.

For a similar reason, under the approach of the court below, the protection afforded by the attorney-client privilege becomes illusory. The court below was careful to hold that the government could not elicit testimony about whether these witnesses spoke to the attorney in reporting on their efforts, or what they said directly to the attorney.[18] App. at 11a. The government ought not be free to avoid the privilege's protections by substituting for the clearly impermissible questions, "What did the at-

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329 U.S. at 512; *see also Special Project, The Work Product Doctrine*, 68 Cornell L. Rev. 760, 839-43 (1983) (the "correct result" is "equal treatment of the oral and written work product"). Indeed, it is *Hickman* that supplies the immunity. The Federal Rules simply define an exception allowing discovery with respect to the production of documents. When work product is sought through testimony rather than through discovery of documents, "one must revert to the principles enunciated in *Hickman*." Moore et al., *supra* note 8, ¶ 26.64[1] at page 26-349.

[18] The attorney-client privilege also protects from disclosure the substance of the attorney-client communications, including information that was learned from counsel. As described in *United States v. Schwimmer*, 892 F.2d 237, 244 (2d Cir. 1989), the privilege applies "regardless of the manner in which it is sought to put the communications in evidence, whether by direct examination, cross-examination, or *indirectly as by bringing out facts brought to knowledge solely by reason of a confidential communication*" (emphasis in the original).

torney tell you?" or "What did you tell the attorney?," questions such as "What did you do, learn, and conclude after your attorney instructed you to conduct an analysis?"

The invasion into attorney-client communications and advice allowed by the lower court's interpretation of the work product rule is plain. In order to carry the proponent's burden of establishing the basis for a claim of privilege, the employee-witnesses made clear through their responses to the Category I questions that any analysis performed had been performed for counsel and provided to counsel. App. at 27a. *See Upjohn*, 449 U.S. at 394. In seeking the analyses and conclusions of these witnesses as a result of these studies, the government was undermining the attorney-client privilege just as surely as if it had asked directly about what transpired in the attorneys' office.

III. THE DECISION BELOW PRESENTS A CLEAR CONFLICT WITH THE PRECEDENTS OF THIS COURT AND OTHER COURTS OF APPEALS ON AN IMPORTANT QUESTION OF FEDERAL LAW

The opinion below is not only wrong, but debilitating in its practical effect on litigation in the federal courts. That is because the work product doctrine "is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial." *Nobles*, 422 U.S. at 238. Because such assistance is so often necessary, the decision below will have an immediate and far-reaching effect on the conduct of virtually every case involving complex facts. Although the party seeking the work product here was the government, the rule announced by the court below—denying work product protection to the efforts of company employees in preparation of a defense—applies by

its terms to any case now pending or anticipated, whether pursued by a private litigant or a prosecutor.

Thus, corporate litigants and their attorneys are now confronted with the dilemma that if they enlist the aid of their employees in the defense and preparation of the case, they risk creating a record that may be inimical to their ultimate interests. At a minimum, they must consider whether by engaging in any particular factual investigation, they will thereby be making their adversary's task that much easier.

Those attorneys who read the decision below as limited only to the work product efforts of *employees*, may resort to outside consultants to develop facts, thus increasing the costs of litigation and, more fundamentally, depriving a litigant of its right to participate fully and knowledgeably in its own defense. On the other hand, those who elect to curtail their efforts, in deference to the risk of disclosure created by the decision of the court below, will be deprived of the full investigation and preparation that our adversary system demands. Litigants will suffer that prejudice to their case without recourse because they cannot appeal an erroneous rule of law with which they have complied.

Litigants who ignore the decision below will act at their peril. If their work product is ordered to be disclosed to their opponent, even they are unlikely to have ready recourse to the courts of appeals, or to this Court, to address the issue because of the interlocutory nature of most privilege rulings.

This is therefore a case in which the decision of the court below is directly in conflict with the decisions of this Court and those of other courts of appeals. It will (if not reversed now) have an immediate and extraordinarily far-reaching effect upon a great many cases, prejudicing many parties, for a long time to come.[19]

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[19] This case is particularly well-suited for review by this Court because there are no documents, depositions or other unwieldly

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

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discovery materials to review in connection with these claims of privilege. The specific questions at issue are set forth in the appendix to the opinion of the court below. The facts are—as the court below remarked—"straightforward and undisputed."

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 333, 334, 335, 336—August Term 1992

(Argued September 2, 1992 Decided November 19, 1992)

Docket Nos. 92-6147, 92-6149, 92-6151, 92-6157

IN RE: SIX GRAND JURY WITNESSES

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOHN DOE #1; JOHN DOE #3; JOHN DOE #5;
JOHN DOE #6,
Respondents-Appellants,

RICHARD ROE; XYZ CORPORATION,
Intervenors-Appellants.

Before:

FEINBERG, NEWMAN, and CARDAMONE,
Circuit Judges.

John Does #1, #3, #5 and #6, and the XYZ Corporation, and Richard Roe, its president, appeal from a June 8, 1992 order of the United States District Court for the

Eastern District of New York (Platt, C.J.) that directed them to answer questions posed by the government consistent with the district court's opinion and denied appellants' motion to quash the grand jury's subpoenas respecting those questions. The objections were based on the attorney-client privilege and the work product doctrine.

Order modified and, as modified, affirmed.

PETER J. ROMATOWSKI, Washington, D.C. (Clifton S. Elgarten, Cary H. Plamondon, Crowell & Moring, Washington, D.C.; Vincenti & Schickler, New York, New York, of counsel), *for Appellant XYZ Corporation.*

HERALD PRICE FAHRINGER, New York, New York (Diarmuid White, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, New York, New York, of counsel), *for Appellant Richard Roe.*

PETER J. TOMAO, Assistant United States Attorney for the Eastern District of New York (Andrew J. Maloney, United States Attorney, Peter A. Norling, Emily Berger, Charles S. Kleinberg, Assistant United States Attorneys for the Eastern District of New York, of counsel), *for Appellee United States of America.*

John F. Kaley, Weinberg, Kaley & Pergament, P.C., Garden City, New York, of counsel; James O. Druker, Kase & Druker, Garden City, New York, of counsel, *filed a joint brief for Respondents-Appellants John Doe #1, John Doe #3, John Doe #5, John Doe #6.*

CARDAMONE, *Circuit Judge*:

Believing it had been deliberately defrauded by a subcontractor under a government contract, the United States

commenced a criminal investigation and summoned several company employees to testify before a grand jury. When the contractor corporation learned it was the target of a criminal investigation it retained counsel, consulted with company officials and implemented an approach to evaluating the work performed that it believed would demonstrate that the government had received fair value for the equipment furnished. The employees responsible for monitoring the costs on the subject government project and who performed the analysis for defense counsel are the ones called before the grand jury. Their refusal to answer certain questions based on their corporate employer's assertion of the attorney-client privilege and the attorney's work product privilege precipitated this appeal.

Squarely presented for reconciliation are the seemingly conflicting interests of disclosure and secrecy. Discovery, designed to advance the pursuit of truth, takes the "sporting" element out of litigation by eliminating surprise. The inviolability of confidential communications between attorney and client and the protected privacy of the attorney's work product also contribute to the efficient functioning of the adversarial system's search for truth. Each ceases to be a privilege when it ceases to be a secret. The question before us asks to what extent may the prosecution obtain access to information defendant counsel alleges it has gathered; or, to phrase it another way, may these employees be compelled—despite the company's assertion of the two privileges—to testify before the grand jury with respect to their activities. With a few exceptions, we think they may be so compelled.

FACTS

The facts in this case are straightforward and undisputed. XYZ Corporation designs and builds timing devices for, among other uses, navigating satellites. A grand jury in the Eastern District of New York is investigating allegations that XYZ and its president, Richard Roe, con-

spired to defraud the United States in violation of 18 U.S.C. §§ 286 and 371 and committed major fraud against the United States in violation of § 1031 by submitting claims containing false statements in violation of § 1001. The investigation concerns XYZ's performance under contracts to design and build a frequency source amplifier, a voltage controlled crystal oscillator, a frequency multiplier power amplifier, a calibration upconverter, a reference generator unit, and a surface acoustic wave oscillator. The government believes XYZ illegally inflated its costs when submitting vouchers for work performed as a subcontractor on contracts called the "Fox" contracts that XYZ had with a prime government contractor producing this sophisticated space equipment.

The investigation of XYZ for making false and inflated claims for payment under the Fox contracts started after "stop work" orders were issued in February 1988. Subsequently, certain of the Fox contracts were terminated altogether; others were renegotiated and continued on a reduced scale. XYZ's payment claims relate to the work it performed up to the date of the stop-work orders. It also made proposals on the reconfigured continuing contracts. The government alleges that XYZ created false books and records in support of its termination payment claims and proposals and that its original corporate records on these contracts were either destroyed or discarded. At the commencement of its investigation in 1990 the government obtained two broad search warrants and a subpoena for "all documents related to the Fox contracts," resulting in its gathering truckloads of documents from XYZ amounting to at least 170 boxes of corporate records.

XYZ retained counsel to represent it in connection with the investigation. In January 1991 defense counsel requested that an analysis of costs be made by certain high-ranking employees—John Does #1 through #6. These employees were engineering manager, program manager,

microwave systems manager, director of marketing, program administrator, and vice-president of systems engineering, respectively. As such, they were the employees responsible for monitoring XYZ's costs and were familiar with the Fox contracts. In conducting their analysis each of them chose what documents they would review. In early 1992 all six employees appeared before the grand jury.

During the course of their grand jury testimony John Does #1, #3, #5 and #6 refused to answer questions with respect to the analysis they had made of the Fox contracts because this work had been done at the direction of XYZ's counsel. The witnesses read a statement setting forth their understanding that the corporation was asserting the confidentiality of the attorney-client privilege with respect to the witnesses' communication with defense counsel and also the confidentiality under the work product privilege of "all information and materials generated" at the direction of counsel.

On January 27, 1992 counsel for the John Doe witnesses advised XYZ's counsel that in pre-grand jury interviews the government prosecutor had questioned them about communications with XYZ's counsel. Defense counsel thereupon suggested that the witnesses be shown documents of the government's own choosing and be asked to analyze them without reference to the analysis witnesses had previously conducted for the defense. In rebuffing this approach, the prosecutor explained that this procedure would not elicit the witnesses' opinions regarding which of the government documents would be relevant to determine the costs incurred under the Fox contracts.

On March 10, 1992 the government obtained a show cause order as to why John Does #1 through #6 should not be held in contempt for refusing to answer certain questions before the grand jury. The actions against

John Does #2 and #4 were later discontinued because they were not asked any disputed questions. The unanswered questions, further questions intended to be asked when the witnesses were recalled, and additional questions outlined in the government's trial brief of May 4, 1992 were submitted to defense counsel. All of these questions were collected and submitted to us after oral argument in a letter dated Sept. 3, 1992 from Assistant U.S. Attorney Peter J. Tomao. The 23 unanswered questions are set forth and attached to this opinion as Appendix A.

After conducting an *in camera* review of the witnesses' analyses, the district court issued an order dated June 8, 1992 directing the witnesses to respond to the questions. This direction was based on the trial court's finding that the information sought by the prosecutor was limited to underlying facts and that the witnesses' responses would not infringe on either of the privileges XYZ Corporation had asserted so long as—the district court carefully added—the questions were not connected to or identified with the analyses the witnesses had conducted at the request of defense counsel. From this order John Does #1, 3, 5 and 6, XYZ Corporation and Richard Roe, its president, appeal. On June 23, 1992 we granted a motion to expedite this appeal.

DISCUSSION

Appellants contend that they may rightfully refuse to answer the questions set forth in Appendix A because the information gathered in the employees' analysis is protected by the attorney-client privilege, and that absent a waiver, the prosecutor has no right to discover the communications of these analyses to defense counsel no matter how great the need. Appellants also assert this information is immune from grand jury inquiry under the attorney's work product doctrine. Specifically, they assert that these privileges protect the "substance" of the work

product, not simply the written analysis, which the government concedes it is not entitled to. The government responds that the information it seeks is limited to underlying facts and opinions relating to the "Fox" contracts within the knowledge of these witnesses and that it is entitled to their testimony before the grand jury because neither the attorney-client privilege nor the work product doctrine protects the requested information. We discuss each of these privileges in general and then in the context of the questions asked of the John Doe witnesses in this case.

I *Attorney-Client Privilege*

Fed. R. Civ. P. 26 permits discovery of any relevant matter not subject to privilege. All agree that the rules of discovery are to be applied broadly, but that according the discovery rules liberal treatment does not license opposing counsel to discover anything and everything. Limitations are imposed on discovery sought in bad faith, to harass or oppress the party subject to it, when it is irrelevant, or when the examination is on matters protected by a recognized privilege. *See Hickman v. Taylor,* 329 U.S. 495, 507-08 (1947). As Fed. R. Evid. 501 states:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

One of the privileges recognized in Rule 501 is the attorney-client privilege. It is, according to Professor Wigmore, the oldest of the common law privileges dating back to the early 16th century, 8 John H. Wigmore,

On Evidence § 2290 (McNaughton rev. ed. 1961), and has encouraged clients to confide in their attorneys fully and frankly, free from the apprehension of disclosure, for nearly 500 years.

The privilege began as an exception to the testimonial compulsion for every witness' evidence. Generally, all relevant proof is essential if determinations by the fact finder are to be made on a complete trial record. Absent full disclosure of all the relevant facts, confidence in the fair administration of justice would cease to exist. *See United States v. Nixon*, 418 U.S. 683, 709 (1974). Because the attorney-client privilege remains an exception that may withhold relevant information at the pre-trial or the trial stage of a criminal prosecution or civil proceeding, it may be invoked to hold secret only those communications made in confidence to a lawyer to obtain legal counsel that would not have been made without the existence of the privilege. *See Fisher v. United States*, 425 U.S. 391, 403 (1976); *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961) (Friendly, J.).

We recognize that the availability of advice from an attorney is essential if corporations are to comply with the ever-increasing complexities of federal law; and, if that advice is to be sought and given there must be predictable certainty as to which communications will be protected. *See In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1036-37 (2d Cir. 1984). Where the client is a corporation, as here, the privilege extends to communications between a lawyer and his or her client—both information provided to the lawyer by the client and professional advice given by an attorney that discloses such information. *See Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981). Yet, the cloak of the privilege simply protects the communication from discovery, the underlying information contained in the communication is not shielded from discovery.

II *Work Product Privilege*

Whether the work product of counsel gathered and devised in preparation for litigation, such as facts, legal contentions or trial tactics, may be discovered is a highly controversial area of the law, as this case illustrates. The boundaries of the doctrine are far from fixed. *See Special Project, The Work Product Doctrine*, 68 Cornell L. Rev. 760, 762 (1983). The leading Supreme Court case, *Hickman v. Taylor*, 329 U.S. 495 (1947), sheds some light on the issues raised here. There defendant's counsel obtained written and oral statements from witnesses in preparation for trial. When plaintiff's counsel sought copies of the statements and a detailed synopsis of the oral statements to examine these witnesses, the Court held that absent a showing of need the statements were protected from discovery as work product of the lawyer. *Id.* at 510.

From that holding, it can be gleaned that the work product doctrine provides a zone of privacy for a lawyer; the doctrine grants counsel an opportunity to think or prepare a client's case without fear of intrusion by an adversary. *See United States v. Nobles*, 422 U.S. 225, 238 (1975). While unwarranted questions probing the attorney's files and theory of the case are barred in criminal as well as civil litigation, *see id.* at 238 n.12, relevant, non-privileged facts may be discovered from an attorney's files where their production is essential to the opponent's preparation of its case. *See Hickman*, 329 U.S. at 511. And, in *Nobles*, the Supreme Court ruled the privilege was not available to prevent disclosure of a defense investigator's report that attacked the credibility of a key prosecution witness, reasoning that once defense counsel elected to produce the investigator as a witness the privilege was waived. 422 U.S. at 239.

Both common law principles embodied in the attorney-client privilege and the work product doctrine are to be

applied in a common sense way in light of reason and experience as determined on a case-by-case basis. *See* Fed. R. Evid. 501; *In Re Grand Jury Subpoena Dated Jan. 4, 1984*, 750 F.2d 223, 224 (2d Cir. 1984). We now proceed to analyze the present questions on that basis by examining the pertinent factors in this case.

III *Privileges With Respect to Present Grand Jury Questions*

Subsequent to the John Does' grand jury appearances, a number of the questions that had not been answered before the grand jury were, in effect, answered in April 1992 affidavits sworn to by several of the John Doe witnesses. These affidavits appeared to have been submitted to show that the direction for the analysis had come from defense counsel and that information thereby gathered was to be turned over to defense counsel and kept confidential. As in *Nobles*, once the questions were answered for defense counsel's purposes, their contents were available for the prosecution's use. *See* 422 U.S. at 239. Those questions that have already been answered therefore are not listed in Appendix A.

We turn to the pending questions. To begin with it seems plain that merely by asking witnesses to conduct an analysis defense counsel may not thereby silence all the key witnesses on the cost aspects of the Fox contracts under either claim of privilege. Were counsel to succeed in such a tactic, the government would never be able to conduct a full and complete investigation of an alleged crime because the critical witnesses would have been effectively silenced, nor for the same reason would the government be able to present all the evidence at trial regarding a defendant's guilt or innocence.

Examining the 23 questions we see no trampling of either privilege, except in four questions. Question #8 "With whom did you discuss this analysis," #9 "What was said [other than to counsel]," #14 "What informa-

tion did you give them [anyone other than [XYZ's] attorney]," and question #15 "When did you give this information to anyone other than [XYZ's] attorney." The form of these four questions, considered in sequence, risks violation of the attorney-client privilege because the witness, in responding, might be understood to be implying to the grand jury that he had conveyed privileged information to the lawyer. Appellee's efforts now to include bracketed exclusions of communications to counsel minimize the risk, but a rephrasing of the questions is preferable to avoid suggesting that the witness is being asked about any aspect of any communication he might have had with the lawyer.

Although an attorney-client communication is privileged and may not be divulged, *see Fisher,* 425 U.S. at 403, the underlying information or substance of the communication is not, as appellants incorrectly believe, so privileged. Further, the remaining 19 questions seek underlying factual information to which the prosecutor is clearly entitled. The factual information is not protected by the attorney-client privilege just because the information was developed in anticipation of litigation.

Moreover, the affidavits examined by the district court *in camera* undercut appellants' assertion regarding the privileged nature of much of the information as attorney's work product. For example, the affidavits contain identical paragraphs and emphasize that the assignment required the witness to make "judgments" and "estimates" and that the results embodied the witness' "mental impressions," all of which concededly are privileged aspects of work product. But nowhere in the affidavits do appellants clarify what those judgments or mental impressions were—even in a very general manner. In fact, the attachments to the affidavits appear to be nothing but straightforward calculations from raw data, making it difficult to imagine what "mental impressions" were involved.

As a consequence, there is no common law privilege barring the government from obtaining answers to these 19 questions from the John Doe witnesses.

CONCLUSION

The district court's order compelling John Doe witnesses #1, #3, #5, and #6 to answer certain listed questions is modified by striking questions #8, #9, #14, and #15 and, as modified, the order is in all other respects affirmed.

APPENDIX A

I. QUESTIONS WHICH WITNESSES REFUSED TO ANSWER ON THE GROUNDS OF PRIVILEGE BEFORE THE GRAND JURY SET OUT IN LETTER FROM PETER J. TOMAO, DATED MARCH 17, 1992 (A 56-60).

1. Q. (With regard to an analysis of the status of the documentation on project 11369 and 11370 as of the time of the stop work order) what did you do?

2. Q. Are you prepared to tell us at this time what analysis you performed (on the Fox contracts)?

3. Q. (With regard to subsequent analysis performed on the Fox contracts) [W]hat analysis did you conduct?

4. Q. [W]hat reviews of the Fox contracts did you conduct?

5. Q. (With regard to the initial analysis performed on the Fox contracts) Do you have any reason as you sit here today to say whether or not these were accurate?

6. Q. (With regard to a study conducted after July 1988) Are you able to tell us what that study was?

II. ADDITIONAL QUESTIONS SET FORTH IN PETER J. TOMAO'S LETTER DATED MARCH 17, 1992.

A. Have you made an effort to determine the total number of labor hours and/or amount of labor costs which were incurred in connection with the Fox contracts?

7. Q. If so, what analysis did you perform?

8. Q. With whom did you discuss this analysis?

9. Q. What was said [other than to counsel]?

10. Q. What records did you review?

11. Q. What information did they give you?

12. Q. When did they give you that information?

13. Q. What conclusions did you draw?

14. Q. What information did you give them [anyone other than XYZ's attorney]?

15. Q. When did you give this information to them [anyone other than XYZ's attorney]?

B. Have you determined that additional hours were worked and/or costs were incurred on the Fox contracts which were not reflected in the original XYZ time sheets and other records?

16. Q. If so, how many or how much?

C. Do you have an opinion as to whether additional hours were worked and/or costs were incurred on the Fox contracts which were not reflected in the original XYZ time sheets and other records?

17. Q. If so, how many or how much?

III. QUESTIONS SET FORTH IN DECLARATION OF CHARLES S. KLEINBERG DATED MAY 4, 1992 (A 198-99).

18. Q. What documents would you need to review to estimate the total labor and other costs incurred by XYZ in connection with the Fox contracts prior to termination?

19. Q. What questions would you need answers to in order to estimate the total labor

and other costs incurred by XYZ in connection with the Fox contracts prior to termination?

20. Q. From whom would you need to get these answers?

21. Q. [the questions identified in answer to (18) and (19)]

22. Q. Estimate the total labor hours and labor costs incurred by XYZ in connection with the Fox contracts prior to termination?

23. Q. Estimate the total costs incurred in XYZ in connection with the Fox contracts prior to termination?

APPENDIX B

UNDER SEAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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92 MISC. 068(TCP)

IN RE SIX GRAND JURY WITNESSES

MEMORANDUM AND ORDER

PLATT, Chief Judge.

The government has moved to compel six witnesses to show cause why they should not be held in contempt for refusing to answer certain questions posed to them in connection with a subpoena seeking their testimony before a grand jury. For the reasons that follow, the motion to intervene is granted, the motion to quash the grand jury subpoenas is granted in part and denied in part, the motion for release of the grand jury transcripts is denied, and the government's motion to hold the respondents in contempt is denied.

BACKGROUND

On March 10, 1992, after the government applied for and received an *ex parte* Order to Show Cause, this Court ordered [John Doe #1 through John Doe #6] (collectively "the respondents") to show cause why they should not be held in contempt for refusing to answer questions asked of them when they were testifying before a grand jury empaneled in this district. The grand jury was investigating allegations that [XYZ Corporation ("XYZ")]

and its senior management, including [Richard Roe, XYZ's] president, had defrauded the United States by inflating costs on certain subcontracts (referred to as the "Fox" contracts) between [XYZ] and TRW, Inc., in connection with highly classified work that TRW, Inc. was performing for an unnamed government agency. Grand jury subpoenas were issued to the six respondents, all of whom are [XYZ] employees, and the respondents, who had entered into immunity agreements with the government, appeared with counsel before the grand jury. When questioned about analyses they conducted regarding the "Fox" contracts, [John Doe #1, John Doe #3, John Doe #4, John Doe #5 and John Doe #6] refused to answer any questions regarding the analyses because they were prepared at the direction of [XYZ's] counsel. [John Doe #2], during preparation for his grand jury testimony, also refused to answer similar questions regarding the analyses. In addition, [John Doe #6] refused to answer any questions regarding statements made by [Roe] at a meeting attended by [Roe], [Roe's] counsel, [XYZ's] counsel and [John Doe #6] arguing that these statements were protected by the attorney-client privilege.[1]

Before the original return date, the government agreed to discontinue this action without prejudice against [John Doe #2] and [John Doe #4] and agreed to provide the respondents, [XYZ] and [Roe] with a list of questions the respondents refused to answer as well as a list of questions the government intended to ask the respondents when they were recalled to testify before the grand jury. The parties then returned on March 27, 1992 for argument since [XYZ] and [Roe] argued that both sets of questions submitted by the government called for the respondents to reveal matters protected by the attorney-client privilege and the work product privilege. At that point, the Court directed counsel for [XYZ] to submit for

[1] The details of the meeting are described in greater detail at *infra* pp. 6-7.

in camera inspection, copies of the analysis in order to ascertain whether the questions asked by the government in fact infringed upon these privileges.

Currently before the Court are the government's Order to Show Cause, [XYZ's] and [Roe's] motion to intervene in these proceedings pursuant to Fed. R. Civ. Pro. 24(a)(2), [XYZ's], [Roe's] and the respondents' motion to quash the subpoenas, and the respondents' motion seeking production, to respondents' counsel, of the grand jury transcripts of the testimony that is the subject of the government's Order to Show Cause.

DISCUSSION

I. [XYZ's] and [Roe's] Motion to Intervene

As an initial matter, the Court is faced with the motions by [XYZ] and [Roe] to intervene in these proceedings.[2] [XYZ] and [Roe] seek to intervene on the basis that the questions asked by the government call for the disclosure of information that is protected by [XYZ's] and [Roe's] attorney-client privilege and work product privilege.

Intervention in an action is permitted:

> when the applicant claims an interest relating to . . . [the] transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. Pro. 24(a)(2). Here, both [XYZ] and [Roe] are the holders of the asserted privileges that form the basis of the respondents' refusal to answer the questions.

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[2] Both [Roe] and [XYZ] were served with a copy of the Order to Show Cause and to date, both parties have participated in these proceedings.

Since the government is seeking to compel the respondents to answer the questions, it is clear that this proceeding may potentially "impair or impede" [XYZ's] and [Roe's] ability to protect their respective privileges. *See In re Grand Jury Empanelled October 18, 1979*, 633 F.2d 282, 286 (3d Cir. 1980); *In re Grand Jury Proceedings (Katz)*, 623 F.2d 122, 125 (2d Cir. 1980); *In re Grand Jury Proceedings (Phe, Inc.)*, 640 F. Supp. 149, 151-52 (E.D.N.C. 1986); *but see In re Grand Jury Subpoena Duces Tecum, August 1986*, 658 F. Supp. 474, 483 (D. Md. 1987) (denying motion to intervene because third party failed to demonstrate more than a "general interest" in the proceedings).

Furthermore, although the respondents have refused to answer the questions posed to them, the respondents have indicated that if this Court finds that the questions do not infringe upon privileged matters and directs them to answer the questions, they will.[3] Based upon the respondents' representations and the fact that the respondents are third parties asserting a privilege on behalf of [XYZ] and [Roe], it is apparent that [XYZ's] and [Roe's] interests are not adequately represented by the respondents, *see In re Grand Jury Proceedings (Phe. Inc.)*, 640 F. Supp. at 151, and therefore, [XYZ's] and [Roe's] motion to intervene must be granted.

II. Statements Made by [Roe] at the January 11, 1991 Meeting:

The government seeks to compel [John Doe #6] to answer questions regarding statements made by [Roe] at a meeting held on January 11, 1991.[4] This meeting was

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[3] *See* Affidavit of John F. Kaley, dated March 13, 1992, ¶ 4; Letter of James O. Drucker, dated May 5, 1992, to Charles Kleinberg, at 1.

[4] [John Doe #6] refused to answer the following question:

Do you intend to assert a privilege with respect to any statements that Mr. [Roe] volunteered to you while you and he were

held at the request of Crowell & Moring, a law firm retained by [XYZ] for the sole purpose of representing and advising [XYZ] in connection with the government's investigation into the "Fox" contracts. *See* Affidavit of Peter J. Romatowski (hereinafter "Romatowski Aff."), dated March 25, 1992, ¶ 2. Present at the January 11th meeting were [XYZ's] regular counsel, Herald Fahringer, [Roe's] attorney, two accountants from Price, Waterhouse, who were specially retained by Crowell & Moring to assist in the investigation, Peter Romatowski and other attorneys from Crowell & Moring, and [Roe]. *See id.* ¶ 10. According to [XYZ's] counsel, the purpose of this meeting was "to further the analysis being performed by Price, Waterhouse . . . and to give direction to [XYZ] personnel to perform certain related analyses," *id.*, to assist in the formulation of a defense strategy. [John Doe #6] was summoned to the meeting and in addition to participating in the discussion, he was directed to conduct an analysis. *See id.* ¶ 11; Affidavit of [John Doe #6] (hereinafter "[John Doe #6] Aff."), ¶ 6. While [John Doe #6] was present, [Roe] made the statements which the Government wishes to learn the substance of and which [John Doe #6] has declined to reveal on the basis that the statements are protected by the attorney-client privilege.

The government argues that the statements made by [Roe] are not privileged for a number of reasons. First, the government argues that the statements made by [Roe] were not kept confidential because [John Doe #6], as a third party, was present at the time the statements were

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in the presence of [XYZ's] attorneys, and even if Mr. [Roe] was not responding to one of the attorney's questions?

Letter of Peter J. Tomao, dated March 17, 1992, to All Counsel, at 3.

While [John Doe #6] is not a target of the grand jury investigation, [Roe] is an individual target and is aware of this fact. *See* Declaration of Charles Kleinberg (hereinafter "Kleinberg Declaration"), dated May 4, 1992, ¶ 5.

made and [John Doe #6] had not entered into a joint defense agreement. Next, the government alleges that the statements made at the meeting were not kept confidential because [John Doe #6] "conveyed the substance of those statements to other [XYZ] employees." Government's Memorandum of Law (hereinafter "Gov'ts Initial Memo."), at 10. Taken together, the government argues that the fact that [John Doe #6] was present and that [John Doe #6] did not keep these statements confidential mean that [Roe's] statements were not "made and maintained," *In re LTV Securities Litigation*, 89 F.R.D. 595, 603 (N.D. Tex. 1981), in confidence and thus, the statements lost the protection of the attorney-client privilege. The government also argues that [Roe] "volunteered" certain statements at the meeting and since [John Doe #6] refused to answer questions regarding statements made by [Roe] that were not in response to questions from counsel, the privilege does not apply. In addition, the government submits that it has not been shown that a "common interest" existed between [John Doe #6] and [Roe], which protects these communications. Finally, the government implies that this was a situation where counsel "manufactured" a privileged situation to block the disclosure of certain information. As part of this argument, the government alleges that "[t]here was no need for [Roe] to be present and to make statements when corporate counsel met with [John Doe #6] and asked [John Doe #6] to perform an analysis." Government's Surreply Memorandum of Law (hereinafter "Gov'ts Third Memo."), at 12.

[XYZ] argues that the statements made by [Roe] are covered by the attorney-client privilege. Under *Upjohn v. United States*, 449 U.S. 383, 390 (1981), the attorney-client privilege applies to corporations and protects the "*giving of professional advice . . . [and] also the giving of information to the lawyer to enable him to give sound and informed advice.*" (emphasis added). In addition, [XYZ] argues that the January 11, 1991 meeting was confidential because [John Doe #6] is not the equivalent

of a "third party" whose presence would destroy the meeting's confidentiality. *Upjohn* allows [XYZ] to claim confidentiality when [XYZ's] counsel engages in communications with all of its employees, not just a "control group." Furthermore, [XYZ] argues that [XYZ] and [Roe] expressly entered into a joint defense agreement with [Roe], in order "to take full advantage of the 'common interest rule' ", Romatowski Aff. ¶ 4, as formulated in *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989), *cert. denied*, 112 S. Ct. 55 (1991). Thus, since the parties had a common interest, in the process of conducting their investigation, they could share confidential communications without waiving the privilege.

[Roe] also argues that his statements, which responded to an inquiry from [XYZ's] counsel, are covered by the attorney-client privilege. Under *Upjohn*, the attorney-client privilege extends to all corporate employees, regardless of whether one or a number of employees are the subject of corporate counsel's inquiry. [Roe] also argues that [XYZ] and [Roe] had a "common interest" in preparing their defense, which was memorialized in a written joint defense agreement, thus warranting protection of the communications. In addition, in [Roe's] view, [John Doe #6] by virtue of his position at [XYZ] as a project manager on some of the "Fox" contracts, had a common interest with [Roe] and [XYZ]. Based upon this "common interest," [John Doe #6's] presence did not destroy the confidentiality of the meeting. [Roe] also argues that his statements are protected by the work product privilege, as defined in *Hickman v. Taylor*, 329 U.S. 495 (1947), because his statements were given to attorneys who were collecting information necessary to render legal advice and to prepare a defense.

As the parties asserting the existence of a privilege, [XYZ] and [Roe] have the burden of establishing that a valid privilege exists. *See, e.g., Fisher v. United States*, 425 U.S. 391, 403 (1976); *von Bulow v. von Bulow*,

811 F.2d 136, 144 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987); *United States v. Davis*, 131 F.R.D. 391, 398 (S.D.N.Y. 1990).

The attorney-client privilege is designed to protect "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance." *Fisher*, 425 U.S. at 403 (citing 8 J. Wigmore, *Evidence*, § 2292 (McNaughton rev. 1961)). The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients," *Upjohn*, 449 U.S. at 389, and focuses "on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation." *Trammel v. United States*, 445 U.S. 40, 51 (1980).

The attorney-client privilege, however, does not protect all communications between a lawyer and a client and for the privilege to attach, a party must demonstrate that:

> (1) the asserted holder of the privilege has sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950); *see United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961); 8 J. Wigmore, *Evidence*, § 2292, at 554. In this case, the disputed issues are whether the statements made by [Roe]

were made without the presence of a stranger and whether these statements were communicated to strangers and thus, were not maintained in confidence.

An otherwise privileged communication is not protected by the attorney-client privilege if the communication is made in the presence of strangers. *See, e.g., United States v. Landof,* 591 F.2d 36, 39 (9th Cir. 1978); *Davis,* 131 F.R.D. at 398. The privilege is also lost if a privileged communication is disclosed to third parties. *See, e.g., United States v. Rockwell Int'l,* 897 F.2d 1255, 1265 (3d Cir. 1990); *United States v. Gotti,* 771 F. Supp. 535, 542 (E.D.N.Y. 1991).

Regarding the first issue, it is a close question but this Court is of the opinion that on balance [John Doe #6] is not the equivalent of a "stranger" and thus, [John Doe #6's] presence did not breach the privilege. As the project manager for four of the "Fox" contracts, it was logical for [XYZ's] counsel to request [John Doe #6's] presence so that he could participate in the discussion conducted at the meeting, when the purposes of the meeting was to formulate a defense strategy. Furthermore, [XYZ's] counsel called [John Doe #6] into the meeting to discuss what analyses should be performed as part of the defense strategy and to assign [John Doe #6] the job of actually performing the analyses. From the affidavits submitted, it is clear that [John Doe #6] was not called into the meeting for any purpose other than to participate in the discussions and to be given instructions as to what analyses he should perform.

As to the second issue, [John Doe #6] was told that the conversations should be kept confidential. [John Doe #6] did have discussions with other [XYZ] employees regarding the January 11th meeting, but these discussions with, at the most, six other [XYZ] employees were for the purpose of giving instructions to these employees so they could assist in the preparation of the analyses. *See* [John Doe #6] Aff. ¶¶ 8-9. In his affidavit, [John Doe #6] states that with the exceptions of the named [XYZ] em-

ployees, [John Doe #6] "did not speak to or discuss with any other employee the nature of the assignment conducted or the conclusions I reached." *Id.* ¶ 10. While the government alleges that [John Doe #6] disclosed what was discussed at the meeting to other [XYZ] employees, the government has produced no evidence to support this allegation and, absent such proof, this Court will accept [John Doe #6's] sworn statement that he did not communicate with any [XYZ] employee except those who were necessary to assist him with the formulation of the analyses. The instructions that [John Doe #6] gave to these employees may not have resulted in a breach of the attorney-client privilege because, as the Supreme Court stated in *Upjohn*, in the course of conducting the analyses that [John Doe #6] was preparing for [XYZ's] counsel, [John Doe #6] was able to communicate with employees "who might be helpful in providing the requested information." 449 U.S. at 387. However, the only way that this may be determined is through an examination of the statements made by [John Doe #6] to the [XYZ] employees which will have to be taken under oath *in camera* and submitted *in camera* to the Court.

The government's argument that the privilege does not apply to the statements that [Roe] allegedly "volunteered" is rejected. First, [Roe's] statements were made in the context of a discussion regarding [XYZ's] and [Roe's] defense strategy and thus, are part of the "full and frank communication between attorneys and their clients." *Upjohn*, 449 U.S. at 389. [Roe's] attorney, counsel for [XYZ] and [John Doe #6] also state that [Roe's] statements were not "volunteered"; rather, they were in response to questions from counsel and were made in the course of the discussion conducted at the meeting. *See* Affidavit of Herald Fahringer ¶ 6; Romatowski Aff. ¶ 12; [John Doe #6] Aff. ¶ 6.

[XYZ] and [Roe] have met their burden of establishing that the statements made by [Roe] are protected by the

attorney-client privilege. Accordingly, with regard to the government's request that [John Doe #6] be ordered to respond to questions concerning the January 11th meeting, [XYZ's] and [Roe's] motion to quash is granted.[5]

III. Analyses Performed by [XYZ] Employees:

The government seeks to have the respondents answer questions regarding the analyses they undertook of the "Fox" contracts. [XYZ] argues that this information is protected under both the attorney-client and the work product privileges. [Roe] also argues in favor of the application of the work product privilege to the analyses.

The Court directed [XYZ] to submit copies of the analyses in order to conduct an *in camera* review of the documents. In addition to the analyses, [XYZ's] counsel submitted an *in camera* affidavit describing, in greater detail, the methods used in conducting the analyses and what part they played in [XYZ's] defense strategy. In addition, [XYZ] also submitted for *in camera* inspection, more detailed affidavits from each of the respondents. These affidavits describe what kind of analyses each of the respondents conducted at the request of counsel and includes the results of each of the respondents' analyses.

Both [XYZ] and the government agree that the actual written analyses produced by the respondents are privileged and therefore, the government does not seek the analyses or seek to discover any information or documents pertaining to or resulting from communications with counsel. *See* Government's Reply Memorandum of Law at 18; [XYZ's] Third Memorandum of Law (hereinatfer "[XYZ's] Third Memo.") at 4. [XYZ] asserts, however, that asking the respondents any questions regarding the analyses would infringe upon the attorney-client and work product privileges. [XYZ] argues that by asking

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[5] Since we have determined that the statements made by [Roe] at the January 11, 1991 meeting are covered by the attorney-client privilege, it is unnecessary to consider [Roe's] claim that his statements are protected by the work product privilege.

the respondents questions concerning the analysis each respondent produced results in the government "do[ing] indirectly what it is prohibited to do directly," [XYZ's] Third Memo. at 4, and is a breach of [XYZ's] privileges.

In support of its argument, [XYZ] notes that the Supreme Court found that the attorney-client "privilege exists to protect . . . the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn*, 449 U.S. at 390. [XYZ] argues that, as in *Upjohn*, the analyses were conducted for the purpose of assisting [XYZ's] counsel and there was no doubt that the work was commissioned by [XYZ's] counsel. Each respondent analyzed matters that were within the scope of their duties and knew that the circumstances of the investigation meant that, with the exception of communication with other employees who would be helpful in performing the analyses, the investigation was to be kept confidential. In [XYZ's] view, the questions posed by the government inquire into areas that are covered by the holding in *Upjohn* and are thus protected from disclosure. [XYZ] also argues that if the respondents were to answer the questions, the details of the analyses as well as privileged communications would be revealed.

[XYZ], as well as [Roe], argue that the analyses are protected as "opinion" work product and such work product is entitled to greater protection than ordinary work product. *See P&B Marina, Ltd. Partnership v. LoGrande*, 136 F.R.D. 50, 57 (E.D.N.Y. 1991); *Coleco Indus., Inc. v. Universal City Studios*, 110 F.R.D. 688, 690 (S.D.N.Y. 1986). Both argue the information sought includes the mental impressions, opinions, estimates and conclusions of the respondents and therefore, is protected. Finally, [XYZ] argues that the government has not met the standard for compelled disclosure of this work product. Since the government has in its possession the documents that the respondents consulted and has had the respondents' cooperation, the government has not met

the test of Rule 26 because it cannot show that it has a "substantial need" for the material and that it "is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed. R. Civ. Pro. 26(b)(3).

The government states that it does not seek information which is protected by either the attorney-client or the work product privileges. Rather, it is only seeking to ascertain the underlying facts and opinions which are within the knowledge of each respondent and such information is not privileged just because it was later communicated to an attorney. In the government's view, this information is not protected by the work product privilege because that privilege "shields only prepared materials, not the facts upon which the materials were based." *Brock v. Frank V. Panzarino, Inc.*, 109 F.R.D. 157, 160 (E.D.N.Y. 1986). Here, the government seeks what the witnesses knew or learned after they reviewed preexisting documents and underlying facts that are within a witness' own knowledge are not privileged, even if the facts were gathered at counsel's direction. Since the information sought consists of facts and opinions, the government argues that [XYZ] cannot rely on the protections of Federal Rule of Civil Procedure 26(b)(3) since that rule only shields the protection of documents or other tangible things.

Finally, if this Court finds that the information is protected by the work product doctrine, the government submits that disclosure of this information can be ordered since the information can be classified as "fact" work product as opposed to "opinion" work product.[6] *See*

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[6] "Fact" work product consists of information that reflects, events, dates, occurrences and a witness' own analyses and opinions while "opinion" work product consists of an attorney's own mental impressions and thought. *See, e.g., Hickman*, 308 U.S. at 508; *Westinghouse Elec. Corp. v. Republic of the Phillipines*, 951 F.2d 1414, 1431 n.18 (3d Cir. 1991); *In re Grand Jury Proceeding, John Doe*, 867 F.2d 539, 541 (9th Cir. 1989).

Hickman, 329 U.S. at 495. "Fact" work product is entitled to less protection than "opinion" work product and disclosure can be compelled upon a showing of "substantial need" by the government. *See In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982). Here, the government argues that it has met its burden of showing "substantial need" because the information is unobtainable from other sources and may provide the government with evidence relevant to crimes currently under investigation.

The government also argues that this information is not protected by the attorney-client privilege. First, the information is not privileged since the government only seeks the facts that the witnesses reconstructed. Next, [XYZ] has not shown that disclosure of the respondents' own opinions would disclose their attorneys' thought processes. Finally, unlike the situation in *Sporck v. Peil*, 759 F.2d 312 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985), the government stresses that it is not seeking to ascertain what documents [XYZ's] counsel selected from the large volume of documents involved, but only wants to learn what documents the respondents selected and reviewed in connection with the analyses.

As discussed earlier, the objective of the attorney-client privilege is to promote full disclosure of all necessary information between an attorney and a client. *See Upjohn*, 449 U.S. at 389; *Trammel*, 445 U.S. at 51. One important aspect of the privilege, however, is that it only applies to the disclosure of communications to an attorney, not to the disclosure of underlying facts to an attorney. *See Upjohn*, 449 U.S. at 395; *United States v. Doe*, 1992 WL 57374, at 6 (2d Cir. Mar. 23, 1992); *Davis*, 131 F.R.D. at 404. As one court aptly noted:

> A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowl-

> edge merely because he incorporated a statement of such fact into his communication to his attorney.

Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962) (quoted in *Upjohn*, 449 U.S. at 385-86).

The work product privilege is designed to protect the "private memoranda and personal recollections prepared or formed by," *Hickman*, 329 U.S. at 510, an attorney in anticipation of litigation or for trial. The work product privilege also extends to criminal cases, including grand jury proceedings, and to material prepared by agents for an attorney. *See United States v. Nobles*, 422 U.S. 225, 238 (1975); *In re Grand Jury Proceedings*, 473 F.2d 840, 842 (8th Cir. 1973).

As has been stated, the government is not seeking to obtain information regarding communications with [XYZ's] counsel or any documents that were produced by or at the direction of counsel. In this case, the information sought is limited to the underlying facts and opinions regarding the "Fox" contracts possessed by or within the knowledge of the respondents.

Based upon a review of the affidavits and the analyses submitted for *in camera* inspection as well as a review of the questions that the government has asked and intends to ask the respondents, this Court finds that the respondents must answer the questions. Responses to questions regarding the analyses would not infringe upon the attorney-client or work product privileges as long as the questions are not connected to or identified with the analyses the respondents' conducted at the request of [XYZ's] counsel. For example, once a respondent has testified to his estimates regarding the total labor hours and costs and the total costs incurred in connection with the "Fox" contracts,[7] a respondent may be asked as to how he

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[7] This discussion refers to the questions numbered (5) and (6) contained in the Kleinberg Declaration, at 6.

arrived at such estimates and as to how the estimates may be applied in this case. The government, however, may not ask the respondent whether any of this information was reported to [XYZ's] counsel. Accordingly, with respect to the questions regarding the analyses, [XYZ's] and [Roe's] motion to quash is denied.

IV. Release of Grand Jury Testimony

The respondents have moved for disclosure of their grand jury testimony. The respondents argue that in order to defend against the contempt proceeding, they must have the transcripts of their testimony. The government opposes this request.

Since there is a "long-established policy," *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958), of maintaining the secrecy of grand jury materials, Federal Rule of Criminal Procedure 6(e)(3)(C)(i) requires a party seeking to obtain the transcript of grand jury proceeding to make a strong showing of particularized need. *See United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 434 (1983); *see also United States v. Moten*, 582 F.2d 654, 662 (2d Cir. 1978) (providing reasons why secrecy is normally accorded to active grand jury proceedings). A grand jury witness "is entitled to a transcript of his own testimony absent a clear showing by the government that other interests outweigh the witness' [sic] right to such transcript." *In re Sealed Motion*, 880 F.2d 1367, 1371 (D.C. Cir. 1989).

Here, the government has shown that other interests outweigh the respondents' interest. The situation presented in this case is unlike the situations presented in *In re Sealed Motion* or Judge Glasser's recent case, *In re Subpoena of James Heimerle*, 1992 WL 584890 (E.D. N.Y. Mar. 4, 1992). In both cases, a request for the release of grand jury testimony was granted. In both cases, however, the grand jury had completed their proceedings while in this case the grand jury investigation

is still proceeding. The government is seeking additional testimony from the respondents and as stated by the government, the release of the respondents' grand jury transcripts may result in premature disclosure of the nature and direction of the grand jury investigation. The government has provided the respondents with a list of questions the respondents refused to answer, thus according the respondents with the ability to formulate a defense to the government's motion. Accordingly, the respondents' request for transcripts of their grand jury testimony is denied.

V. Entry of a Contempt Order

[XYZ] and [Roe] argue that if the motion to quash the subpoenas is denied, the Court should not hold the respondents in contempt, but instead should order the respondents to comply with the subpoenas. [XYZ] and [Roe] assert that they would have a right to appeal this Court's order even if the respondents had not been held in contempt. Relying upon *Katz*, 623 F.2d 122, 124 (2d Cir. 1980), [XYZ] and [Roe] argue that since the respondents are not under their control, the respondents are not the holders of the privileges that have been asserted and the respondents have indicated that they are unwilling to suffer a finding that they are in contempt, for the purposes of a final order, it is unnecessary for this Court to hold the respondents in contempt.

Since the grand jury subpoenas are directed against third parties who are not the holders of the privileges involved, this Court declines to enter an order finding the respondents in contempt and directs the respondents to answer the questions posed by the government, consistent with this opinion.

CONCLUSION

To summarize the above rulings: [XYZ's] and [Roe's] motion to intervene is granted. The motion to quash the grand jury subpoenas with respect to the questions regarding the January 11th meeting attended by [John Doe #6], [Roe] and others is granted. The motion to quash the grand jury subpoenas with respect to the questions regarding the analyses conducted by the respondents is denied, consistent with the guidelines set forth in this opinion. The motion to hold the respondents in contempt is denied. The motion for release of the transcripts of the respondents' grand jury testimony is denied.

SO ORDERED.

/s/ Thomas C. Platt
Chief Judge, U.S.D.C.

Dated: Brooklyn, New York
June 8, 1992

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of January one thousand nine hundred and ninety-three.

IN RE: SIX GRAND JURY WITNESSES

Docket Number: 92-6147

UNITED STATES OF AMERICA,
Appellee,

v.

JOHN DOE #1; JOHN DOE #3; JOHN DOE #5;
JOHN DOE #6,
Respondents-Appellants,

RICHARD ROE; XYZ CORPORATION,
Intervenors-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Respondents-Appellants, John Doe #1, John Doe #3, John Doe #5, and John Doe #6, and Intervenors-Appellants, Richard Roe and XYZ Corporation.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,
ELAINE B. GOLDSMITH
Clerk

By: /s/ Carolyn Clark Campbell
CAROLYN CLARK CAMPBELL
Chief Deputy Clerk

No. 92-1659

In the Supreme Court of the United States

OCTOBER TERM, 1992

XYZ CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the work product doctrine gives corporate employees a right to refuse to testify about their knowledge of the costs incurred by their employer in performing a government contract, on the ground that the corporation's defense counsel had previously requested the employees to analyze those costs.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-15a, is reported at 979 F.2d 393. The opinion of the district court, Pet. App. 16a-33a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1992. A petition for rehearing was denied on January 15, 1993. The petition for a writ of certiorari was filed on April 14, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. XYZ Corporation (XYZ) designs and builds timing devices for navigating satellites. A grand jury in the Eastern District of New York is investigating allegations that XYZ and its president, Richard Roe, conspired to defraud the United States, in violation of 18 U.S.C. 286 and 371; committed major fraud against the United States, in violation of 18 U.S.C. 1031; and made false statements in a matter within the jurisdiction of a department or agency of the United States, in violation of 18 U.S.C. 1001. The government is investigating whether XYZ illegally inflated its costs on vouchers it submitted for work performed in connection with a series of subcontracts (the "Fox" contracts) between XYZ and a prime contractor producing sophisticated space equipment for the United States. Pet. App. 3a-4a.

After the execution of a search warrant at XYZ's premises in 1990, XYZ retained counsel to represent it in connection with the investigation. In January 1991, defense counsel requested that John Does #1 through #6—high-ranking employees of XYZ responsible for monitoring XYZ's costs—conduct an analysis of XYZ's costs related to the Fox contracts. In early 1992, all six employees appeared before the grand jury. During the course of their testimony, John Does #1, #3, #5, and #6 refused to answer questions with respect to the analyses they had made of the Fox contracts because the work had been done at the direction of XYZ's counsel. The witnesses read a statement setting forth their understanding that such information was protected from disclosure under the attorney-client privilege and the work product doctrine. Pet. App. 4a-5a.

On January 27, 1992, counsel for the John Doe witnesses advised XYZ's counsel that in pre-grand jury interviews the prosecutor had questioned the witnesses about their communications with XYZ's counsel. Defense counsel suggested to the prosecutor that the witnesses be shown documents of the government's choosing and be asked to analyze them without reference to the analysis the witnesses had previously conducted for the defense. The prosecutor rejected that suggestion, explaining that the proposed procedure would not elicit the witnesses' opinions regarding which documents would be relevant in determining the costs incurred under the Fox contracts. Pet. App. 5a.

2. On March 10, 1992, the government obtained an order requiring the witness to show cause why they should not be held in contempt for refusing to answer certain questions before the grand jury. The government provided counsel for the witnesses, XYZ, and Roe with a list of questions that the witnesses refused to answer, as well as additional questions that the government intended to ask the witnesses when they were recalled before the grand jury.[1] The questions are directed to determining the labor hours and costs incurred in connection with the Fox contracts. As part of that inquiry, the government sought to ask the witnesses what documents they would need to review and what questions they would need answered. The government made clear that it did not seek to obtain information pertaining to any communications with counsel or any documents produced

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[1] The questions are set forth in the appendix to the court of appeals' opinion. Pet. App. 13a-15a.

at the direction of counsel. Pet. App. 5a-6a; Gov't C.A. Br. 6-7.

After conducting an in camera review of the witnesses' analyses, the district court directed the witnesses to respond to the questions. The district court found that "the government is not seeking to obtain information regarding communications with [XYZ's] counsel or any documents that were produced by or at the direction of counsel." Pet. App. 30a. Rather, the court concluded that "the information sought is limited to the underlying facts and opinions regarding the 'Fox' contracts possessed by or within the knowledge of the [witnesses]." *Ibid.* The court concluded that the questions therefore "would not infringe upon the attorney-client or work product privileges as long as the questions are not connected to or identified with the analyses the [witnesses] conducted at the request of [XYZ's] counsel." *Ibid.* The court explained that "once a [witness] has testified to his estimates regarding the total labor hours and costs and the total costs incurred in connection with the 'Fox' contracts, [he] may be asked as to how he arrived at such estimates and as to how the estimates may be applied in this case," but "[t]he government * * * may not ask the [witness] whether any of this information was reported to [XYZ's] counsel." *Id.* at 30-31a.

3. The court of appeals affirmed with respect to 19 of the 23 questions at issue. Pet. App. 1a-12a. The court rejected petitioners' contention that the information in the employees' analyses is protected against disclosure to the grand jury by the attorney-client privilege or the work product doctrine, because counsel could not "silence all the key witnesses on the

cost aspects of the Fox contracts" simply by requesting them to conduct a cost analysis. *Id.* at 10a. If counsel could "succeed in such a tactic," the court explained, "the government would never be able to conduct a full and complete investigation of an alleged crime because the critical witnesses would have been effectively silenced." *Ibid.*

The court of appeals held that the majority of questions seek "underlying factual information," not communications to counsel, and that those underlying facts are "not protected by the attorney-client privilege just because the information was developed in anticipation of litigation." Pet. App. 11a. With respect to four questions (Questions #8, #9, #14, and #15), however, the court required "rephrasing * * * to avoid suggesting that the witness is being asked about any aspect of any communication he might have had with" defense counsel. *Ibid.*

The court of appeals also held, with respect to the work product doctrine, that the affidavits submitted by the witnesses undercut the assertion that the questions sought "judgments," "estimates," or "mental impressions" protected against disclosure as "attorney's work product." Pet. App. 11a. The court explained that "nowhere in the affidavits do appellants clarify what those judgments or mental impressions were—even in a very general manner." *Ibid.* The court added that, "[i]n fact, the attachments to the affidavits appear to be nothing but straightforward calculations from raw data, making it difficult to imagine what 'mental impressions' were involved." *Ibid.* Accordingly, the court of appeals affirmed the district court's order directing the witnesses to answer questions, as modified to avoid any

possible intrusion on communications with counsel. *Id.* at 12a.

ARGUMENT

Petitioners contend that the district court erred in directing the employee witnesses to answer the questions concerning the information reflected in the cost analyses. They argue that that information is protected from disclosure by the work product doctrine. Pet. 9-17. The courts below correctly rejected that claim, and it warrants no further review.

1. In *Hickman* v. *Taylor*, 329 U.S. 495, 510 (1947), the Court recognized a qualified immunity from discovery for the "files and the mental impressions of an attorney" prepared in anticipation of litigation. Under *Hickman*, the "work product of the lawyer" may be discovered only upon a sufficient showing of necessity.[2] *Id.* at 511-513. In reaching that conclusion, the Court expressed concern that "[w]ere such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." *Id.* at 511. As a result, "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice in the preparation of cases for trial." *Ibid.* The Court made clear, however, that relevant, nonprivileged

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[2] The Court drew a distinction between written witness statements and the mental impressions of an attorney. The Court said that "written statements secured from witnesses" could be produced upon an adequate justification, 329 U.S. at 512, but it would be a "rare situation," *id.* at 513, if any exists, in which a party could justify production of "oral statements made by witnesses to [the adversary's attorney], whether presently in the form of his mental impressions or memoranda." *Id.* at 512.

facts obtained through the attorney's investigation are subject to discovery. *Id.* at 508-509, 513.

Since *Hickman*, the work product doctrine has been embodied in Fed. R. Civ P. 26(b)(3). That Rule provides that a party may obtain discovery of "documents and tangible things otherwise discoverable * * * and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative * * * only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." The Rule requires the district court, when ordering discovery of such materials on the requisite showing, to protect against disclosure of "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." The Court has held that the work product doctrine applies in criminal as well as civil cases. *United States* v. *Nobles*, 422 U.S. 225, 238 (1975).

As the Court recognized in *Hickman*, 329 U.S. at 504, 508-509, 513, there is a distinction between documents that a party has created and the facts contained in those documents. "[T]he courts have consistently held that the work product concept furnishes no shield against discovery * * * of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery." 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2023, at 194 (1970); 4 J. Moore, J.

Lucas & G. Grotheer, Jr., *Moore's Federal Practice* ¶26.64[1], at 26-287 (2d ed. 1993) ("Rule 26(b)(3) applies only to the production of documents and tangible things; underlying facts are freely discoverable."). See *In re Int'l Sys. & Controls Corp. Securities Litigation*, 693 F.2d 1235, 1240 (5th Cir. 1982); *Nutmeg Insurance Co.* v. *Atwell, Vogel & Sterling*, 120 F.R.D. 504, 509 (W.D. La. 1988); *Eoppolo* v. *National R.R. Passenger Corp.*, 108 F.R.D. 292, 294 (E.D. Pa. 1985); *Ford* v. *Philips Electronics Instruments Co.*, 82 F.R.D. 359, 360-361 (E.D. Pa. 1979). The Advisory Committee Notes to Fed. R. Civ. P. 26 explicitly state that the Rule makes "[n]o change * * * in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable" under the work product doctrine. See J. Gergacz, *Attorney-Corporate Client Privilege* 7-15 (2d ed. 1990) ("Although work product removes certain items from discovery, the information contained in the work product is discoverable unless a separate claim of confidentiality can be raised.").

2. Petitioners argue that the work product doctrine entitles the employee witnesses to refuse to testify about their knowledge of the costs on the Fox contracts. That claim is incorrect. The government does not seek disclosure of any document or tangible item reflecting the employees' analyses. Rather, the evidence sought from the witnesses is precisely the type that is not protected under the work product doctrine—nondocumentary, factual information concerning the costs that were allocable to the Fox contracts and the manner in which those costs were determined from pre-existing documents. The work

product doctrine does not apply to such factual information.[3] Although the information was assembled in anticipation of litigation, its pre-existing factual content was in the possession of XYZ long before any litigation was anticipated. The information does not become protected simply because defense counsel requested that it be examined by employees.[4]

Petitioners argue (Pet. 16) that the government is limited to asking the employees what they knew before counsel asked them to conduct an inquiry, and that the government is barred from asking them anything about information they learned after that request was made. That is just a way of arguing that

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[3] As Professor Gergacz explains:

> Thus, a work product request that seeks to protect something other than a tangible item is inappropriate. One commentator suggested that work product is sometimes mistakenly raised as [if] it were a type of privilege; that is, as if the information itself is protected by the doctrine independent of the document that contains it. For example, during a deposition, a party may raise an objection concerning a certain line of questioning because it relates to protected work product. The objection is inappropriate. Work product does not extend that far.

J. Gergacz, *supra*, at 7-15 to 7-16 (footnote omitted).

[4] Petitioners cite (Pet. 15 n.14) numerous cases standing for the proposition that the work product doctrine protects documents and tangible items containing "fact" or "ordinary" work product as well as those containing "opinion" work product. We agree with that proposition, but it does not help petitioners. None of the cited cases contradicts the rule that one party may obtain discovery of facts known to an adverse party notwithstanding that the facts are contained in a protected document, and none of those cases conflicts with the court of appeals' decision in this case.

the corporation is entitled to shield facts from discovery by making those facts the subject of an internal investigation in anticipation of litigation. Here, the witnesses simply reconstructed in 1991 information that had been in XYZ's possession since 1988, when the company performed the Fox contracts. As the court of appeals recognized, Pet. App. 10a, defense counsel cannot convert information already possessed by his client into protected work product merely by directing the client to reconstruct the information and summarize it in a memorandum to the attorney.

If petitioners' approach were adopted, it would effectively deprive the government of accurate testimony concerning the costs associated with the Fox contracts. The employee witnesses cannot be expected to have detailed recollections of complex cost information three years after the events in question, and, even if they recalled it, they would have difficulty separating what they gleaned from their recent review of corporate records and what they knew beforehand. Thus, petitioners' approach would bar the grand jury from making inquiry of the only people likely to be familiar with the corporation's cost information. The breadth of petitioners' theory is illustrated by their claim that the government cannot even ask the witnesses "[w]hat documents would you need to review" and "[w]hat questions would you need answers to," to be able "to estimate the total labor and other costs incurred by XYZ in connection with the Fox contracts prior to termination." Pet. App. 14a-15a. Such a rule would frustrate the grand jury's purpose of determining whether crimes have

been committed in XYZ's performance of the Fox contracts.[5]

Petitioners' reliance (Pet. 17) on *Marine Petroleum Co.* v. *Champlin Petroleum Co.*, 641 F.2d 984 (D.C. Cir. 1979), is misplaced. That case involved the application of Fed. R. Civ. P. 26(b)(4)(B), which provides qualified protection for a nontestifying expert's knowledge and opinions developed in anticipation of litigation. The court of appeals required the expert to testify as to facts known and the opinions held prior to his engagement in connection with the litigation, but barred inquiry with respect to information developed by the expert thereafter. 641 F.2d at 994. The court made clear, however, that the *party* would be required to produce in discovery any relevant facts that it had learned from the expert. *Ibid.* And there was no suggestion in *Marine Petroleum* that the information acquired by the expert in preparation for litigation was in the party's possession before litigation was anticipated.

Finally, petitioners contend (Pet. 19-20) that requiring the witnesses to answer the government's questions would undermine or, perhaps, violate XYZ's

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[5] Petitioners err in arguing (Pet. 16 n.15) that the cost analyses do not contain "pre-existing facts," but contain only facts "generated" by the investigation requested by counsel. As the court of appeals explained after reviewing the materials submitted to the district court for in camera examination, the witnesses' cost determinations amounted to "nothing but straight-forward calculations" from the pre-existing "raw data." Such a review of corporate cost documents does not produce new "facts." And, to the extent that petitioners argue in passing (Pet. 15 n.13) that the employees' conclusions qualified for heightened protection as "mental impressions," the court of appeals squarely rejected that claim. Pet. App. 11a.

attorney-client privilege, because the answers would disclose the substance of communications made by XYZ's employees to counsel. That is incorrect. The protection of the attorney-client privilege

> extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated [it] into his communication to his attorney.

Upjohn Co. v. *United States*, 449 U.S. 383, 395-396 (1981), quoting *Philadelphia* v. *Westinghouse Electric Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962). The court of appeals carefully limited the inquiries permitted in this case to "avoid suggesting that the witness is being asked about any aspect of any communication he might have had with the lawyer." Pet. App. 11a.

Here, the government does not seek to learn what the witnesses told counsel; rather, it seeks to obtain from the witnesses facts within their knowledge that they may also have disclosed to counsel. If the disclosure of such facts in this case would indirectly reveal to the government the substance of attorney-client communications, that is only because, in asserting claims of privilege, the witnesses volunteered that their analyses had been performed for and provided to counsel. A witness may not bootstrap a claim of attorney-client privilege by voluntarily revealing that the facts sought by the government had been incorporated into communications with his lawyer.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1993

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60298

FILED
JUN 8 1993
OFFICE OF THE CLERK

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PETITIONERS' REPLY BRIEF

Petitioners respectfully submit this Reply to the Brief For The United States In Opposition To The Petition For A Writ Of Certiorari.

ARGUMENT

The United States' fundamental misstatement of the question presented by the petition and the decision of the court below reflects the confusion engendered by that decision.

1. The United States presents the question as:

> "Whether the work product doctrine gives corporate employees a right to refuse to testify about

> *their knowledge of the costs incurred by their employer in performing a government contract*, on the ground that the corporation's defense counsel had previously requested the employees to analyze those costs."

Opp. at (I) (emphasis added). The answer to the question posed by the United States is, of course, "no." The work product doctrine does not exempt a witness from testifying about the facts. But the question presented, as recast by the United States, does not reflect the issue raised by the decision of the court below. That is because the inquiries to the witnesses in the grand jury—to which Petitioners objected, and which were the subject of the decision of the court below—were *not* directed to the witnesses' "knowledge of costs incurred . . .," but rather to the witnesses' efforts for counsel. To the extent the government was interested in the underlying facts, it chose to get at those facts in an impermissible way—by seeking to discover them by asking about the witnesses' efforts for defense counsel.

Specifically, having learned that the individual Petitioners had performed analyses at the direction of Company counsel, the government asked directly and repeatedly about *those* analyses and the conclusions drawn from them: "what did you do?", "tell us . . . what analysis you performed?", "what analysis did you conduct?", "what reviews . . . did you conduct?", "were these [analyses] accurate?", "tell us what that study was?", and "what conclusions did you draw?" Pet. at 7 and App. 13a, 14a (Questions 1-6, 13). The holding of the court below is that the government was permitted to ask those specific questions. The failure of the United States to acknowledge the difference between asking about the underlying facts directly, on the one hand, and finding facts by asking directly for defense counsel's work product, on the other, demonstrates the confusion on this important issue engendered by the decision below.

2. Similarly, it is simply not true, as the United States argues, that

> "The breadth of petitioners' theory is illustrated by their claim that the government cannot even ask the witnesses "[w]hat documents would you need to review' and '[w]hat questions would you need answers to,' to be able 'to estimate the total labor and other costs incurred by XYZ in connection with the Fox contracts prior to termination.' "

Opp. at 10, *citing* Pet. App. 14a-15a. No objection was ever raised to these "Category III" questions.[1] To the contrary, our Petition reiterates the same view of these "Category III' questions as we took in the court below: [2] ". . . these 'Category III' questions, which do *not* inquire about the analyses performed for counsel, could properly be asked by the government (provided the witnesses were instructed to answer from their pre-existing knowledge of the underlying facts and without reference to their work for Company counsel)." Pet. at 6, App. 14a-15a. Petitioners repeatedly urged the government to ask the witnesses questions about the underlying facts, or to perform any analysis the government wished, but simply not to ask about the analysis done for defense counsel. App. 5a. In short, these "Category III" questions were *not* at issue in the court below and are not at issue in this Petition. The Category III questions do, however, serve to highlight the critical distinction between proper questions about a witness' knowledge ("What documents *would you need to*

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[1] The government did *not* pose such questions to the witnesses in the grand jury. These questions were the Category III (the "Kleinberg questions") questions tendered by the government on May 4, 1992 late in the district court proceedings, as questions the government proposed to ask in the future. *See* App. 6a, 14a. These questions were of a different character than those that had been previously tendered, for they did not inquire about the analyses for counsel.

[2] *See* Br. For Intervenor-Appellant XYZ Corporation, No. 92-6147 at 17-18 (the brief for Petitioners in the Second Circuit).

review to estimate . . . costs . . .?") (App. 14a), and the improper questions, directed to a witness' work for defense counsel, which the court below mistakenly approved ("What records *did you review* [to assist Company counsel]?" (App. 14a)).

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

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